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ABSTRACT

This paper discusses the implications and probable impact of proposed federal legislation governing collective bargaining for state and local government employees, including teachers and school administrators. The author focuses his attention on HR 8677, which would create a federal commission to regulate public employer-employee relations, and HR 77, which would place all public employees under jurisdiction of the National Labor Relations Act. Passage of either bill is unacceptable, the author feels, because it would allow a federal agency to preempt the authority of elected state and local government officials. For the public schools, such a law would cause even more damage, he argues, by unduly broadening the scope of collective negotiations and by undermining the traditional distinction in employment matters between teachers and administrative personnel. (JG)

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PROPOSED FEDERAL LAWS COVERING COLLECTIVE BARGAINING FOR PUBLIC Employees

by Fred M. Heddinger

LET ME BEGIN BY POINTING OUT THAT THE ISSUES PRESENTED BY PROPOSED FEDERAL LAWS COVERING COLLECTIVE BARGAINING FOR PUBLIC EMPLOYEES ARE PERHAPS THE MOST IMPORTANT CURRENT ISSUES TO CONFRONT PUBLIC OFFICIALS, AND TO CONFRONT THE GENERAL FUNCTIONING OF REPRESENTATIVE GOVERNMENT IN OUR SOCIETY. THESE ISSUES ARE FAR-REACHING AND OF FUNDAMENTAL SIGNIFICANCE - THEY DESERVE FAR MORE ATTENTION AND DISCUSSION THAN THEY HAVE RECEIVED TO THIS POINT IN TIME.

TWO RECENT COURT ACTIONS IN FEDERAL COURTS HAVE A SIGNIFICANT BEARING ON OUR DISCUSSIONS HERE ABOUT PROPOSED FEDERAL COLLECTIVE BARGAINING LAWS. SO LET ME TOUCH UPON THE SIGNIFICANCE OF THOSE CASES BEFORE TURNING TO OTHER AREAS OF DISCUSSION.

THE WHOLE PROPOSITION AS TO WHETHER OR NOT THE FEDERAL GOVERNMENT HAS THE AUTHORITY TO ENACT AND IMPLEMENT LEGISLATION SUCH AS WERE EMBODIES IN HR 8677 AND HR 9730, OR S 3294 AND S 3295 (93RD CONGRESS - HR 77 IS EQUAL TO HR 9730), HAS BEEN LARGELY PREDICATED UPON THE MARYLAND V. WIRTZ CASE AND AN EARLIER CASE THAT DEALT WITH THE SOVEREIGNITY RIGHTS OF STATES WHEN ENGAGED IN PROPRIETARY FUNCTIONS REGULATED BY FEDERAL

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INTERSTATE COMMERCE REGULATIONS. THE TWO CASES ALLUDED TO PREVIOUSLY THROW NEW LIGHT ON THE EFFECT OF THOSE DECISIONS, ESPECIALLY THE MARYLAND V. WIRTZ DECISION.

RECENTLY THE NATIONAL LEAGUE OF CITIES AND THE NATIONAL GOVERNORS CONFERENCE FILED SUIT IN THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, CHALLENGING 1974 AMENDMENTS TO THE FAIR LABOR STANDARDS ACT. JOINING AS PLAINTIFFS IN THE SUIT ARE THE STATE OF ARIZONA; THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; SALT LAKE CITY, UTAH; THE CITY OF LOMPOC, CALIFORNIA AND THE CITY OF CAPE GIRARDEAU, MISSOURI.

SEEKING A DECLARATORY JUDGMENT THAT THE AMENDMENTS "UNCONSTITUTIONALLY ATTEMPT TO REGULATE ESSENTIAL STATE AND LOCAL GOVERNMENT FUNCTIONS", BY PLACING MUNICIPAL AND STATE EMPLOYEES UNDER FEDERAL WAGE AND HOUR RULES, THE SUIT RELIES UPON THE TENTH AMENDMENT TO THE CONSTITUTION WHICH SAYS: "THE POWER NOT DESIGNATED TO THE UNITED STATES BY THE CONSTITUTION NOR PROHIBITED BY IT TO THE STATES, ARE RESERVED TO THE STATES RESPECTIVELY OR TO THE PEOPLE". THE SUIT FURTHER CITES VIOLATION OF THE FIFTH AMENDMENT, ALSO. THIS PENDING COURT CASE IS ESPECIALLY SIGNIFICANT, SINCE THE WIRTZ CASE GREW OUT OF A 1966 AMENDMENT TO THE FAIR LABOR STANDARDS ACT THAT WAS LARGELY OVERLOOKED BY STATE AND LOCAL GOVERNMENTS, AND THAT WAS NOT REALLY RECOGNIZED FOR WHAT IT WAS AT THE TIME OF ENACTMENT.

CONGRESSMAN THOMPSON, WHO HEADED THE HOUSE SUB-COMMITTEE THAT CONDUCTED HEARINGS ON HR 8677 AND HR 9730, AND OTHER CONGRESSMEN WHO EXPRESSED SUPPORT FOR SUCH LEGISLATION BASED MUCH OF THEIR SUPPORT ON THE PRESUMPTION OF STATE LOSS OF SOVEREIGNITY THAT GREW OUT OF THE WIRTZ CASE. WE WILL COME BACK TO A LATER DISCUSSION ON WIRTZ.

THE SECOND RECENT CASE THAT I BRING TO YOUR ATTENTION IS ONE OUT OF THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA WHERE THE COURT UPHELD THE CONSTITUTIONALITY OF A NORTH CAROLINA STATUTE THAT DECLARES AGREEMENTS OR CONTRACTS BETWEEN STATE AND LOCAL GOVERNMENTAL AGENCIES TO BE AGAINST THE PUBLIC POLICY OF THE STATE AND ILLEGAL.

THIS COURT DECISION GREW OUT OF A SUIT FILED BY THE NORTH CAROLINA ASSOCIATION OF EDUCATORS THAT CLAIMED THAT THE STATUTE VIOLATED THEIR CONSTITUTIONAL RIGHTS UNDER THE FEDERAL CONSTITUTION. SAID THE COURT: ". . . WE CANNOT ACCEPT THE PREMISE - - - THAT STATE GOVERNMENTAL UNITS (ARE REQUIRED TO) NEGOTIATE AND ENTER INTO CONTRACTS WITH THEM (UNIONS). THE CONSTITUTION DOES NOT MANDATE THAT ANYONE, EITHER THE GOVERNMENT OR PRIVATE PARTIES, BE COMPELLED TO TALK TO OR CONTRACT WITH AN ORGANIZATION."

"SETTING GOALS AND MAKING POLICY DECISIONS ARE RIGHTS INURING TO EACH CITIZEN; ALL CITIZENS HAVE THE RIGHT TO ASSOCIATE IN GROUPS IN ORDER TO ADVOCATE THEIR SPECIAL INTERESTS TO

THE GOVERNMENT; AND IT IS SOMETHING ENTIRELY DIFFERENT TO GRANT ANY ONE INTEREST GROUP SPECIAL STATUS AND ACCESS TO THE DECISION-MAKING PROCESS," THE COURT SAID.

"THE PRIVATE EMPLOYER'S PREROGATIVES ARE HIS TO SHARE AS HE SEES FIT, BUT THE CITIZEN'S RIGHT TO PARTICIPATE IN GOVERNMENTAL DECISIONS CANNOT BE BARGAINED AWAY BY ANY PUBLIC OFFICIAL," THE JUDGE SAID.

THE COURT POINTED OUT RELIANCE UPON THE TENTH AMENDMENT AND SAID THESE THINGS: "VIEWED IN THIS CONTEXT, PLAINTIFF'S PURPORTED RIGHT TO ASSOCIATE VIA COLLECTIVE BARGAINING MUST COMPETE WITH EQUALLY, IF NOT MORE IMPORTANT RIGHTS BELONGING TO THE CITIZENRY."

"THE ACTUAL DECISION OF HOW TO ACCOMMODATE PUBLIC EMPLOYES IN THE DECISION-MAKING PROCESS WITHOUT DENYING THE RIGHT OF ASSOCIATION TO OTHERS IS A LEGISLATIVE DECISION. BOTH LEGALLY AND LOGICALLY THAT DECISION IS THE PREROGATIVE OF THE LEGISLATURE, WHICH IS MUCH BETTER SUITED TO MAKE IT THAN ARE THE FEDERAL COURTS, WHOSE MANY DUTIES CANNOT, UNDER OUR SYSTEM OF GOVERNMENT, INCLUDE THOSE OF LEGISLATION. IN NORTH CAROLINA, THE LEGISLATURE HAS DECIDED TO RESOLVE THE COMPETING INTERESTS BY VOIDING CONTRACTS BETWEEN THE STATE AND PUBLIC EMPLOYE LABOR ORGANIZATIONS."

THE COURT EMPHASIZED THAT STATES' SOVEREIGNITY "MEANS MORE THAN PREROGATIVES BELONGING TO SOME INANIMATE OBJECT; RATHER IT

SIGNIFIES THE RIGHT OF THE PEOPLE OF A STATE TO GOVERN THEMSELVES UNDER THE FORM OF GOVERNMENT OF THEIR CHOOSING."

IN TESTIMONY BEFORE THE PREVIOUSLY REFERENCED HOUSE SUBCOMMITTEE REPRESENTATIVES OF THE ORGANIZATIONS MAKING UP THE COALITION OF AMERICAN PUBLIC EMPLOYEES (CAPE) MADE REFERENCE TO WIRTZ AND A MISSOURI CASE AS ILLUSTRATIVE OF THE FACT THAT SOVEREIGN IMMUNITY IS NO LONGER AN ISSUE FROM SUCH LEGISLATION AS IS PROPOSED BY THESE VARIOUS BILLS. HOWEVER, THE CITED PASSAGE FROM THE MISSOURI CASE WOULD HAVE ONE BELIEVE THAT THE COURT REACHED AN OPPOSITE CONCLUSION THAN IT DID. THE U.S. SUPREME COURT IN EMPLOYEES OF THE DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF MISSOURI ET AL VS. DEPARTMENT OF PUBLIC HEALTH AND WELFARE OF MISSOURI ET AL, IN FACT, SAID: "BY HOLDING THAT CONGRESS DID NOT (EMPHASIS ADDED) LIFT THE SOVEREIGN IMMUNITY OF THE STATES UNDER FLSA (FAIR LABOR STANDARDS ACT), WE DO NOT MAKE THE EXTENSION OF COVERAGE TO STATE EMPLOYEES MEANINGLESS. - - - SECTION 16 (C) (OF FLSA) GIVES THE SECRETARY OF LABOR AUTHORITY TO BRING SUIT FOR UNPAID MINIMUM WAGES OR UNPAID OVERTIME COMPENSATION UNDER FLSA." THE POINT MADE BY THE COURT WAS THAT ALTHOUGH WIRTZ ESTABLISHED THE CONSTITUTIONAL BASIS FOR THE APPLICATION OF FLSA TO THE STATES AND THEIR EMPLOYES, MISSOURI SAYS THAT SUCH ACTION DOES NOT LIFT THE SOVEREIGN IMMUNITY OF THE RESPECTIVE STATES. THE COURT SAID: "THE HISTORY AND TRADITION OF THE ELEVENTH AMENDMENT INDICATES THAT BY REASON OF THAT BARRIER A FEDERAL COURT IS NOT COMPETENT TO RENDER JUDGMENT AGAINST A NONCONSENTING STATE."

As you can see, these references discussed thus far at the least raise considerable question regarding the statement made by Ralph J. Flynn, CAPE executive director, before the Senate Sub-committee on Labor where he said: "The authority for federal intervention is now equally incontestable; it has been confirmed both in constitutional theory through a series of court decisions and in practice by the inclusion of state and local employees under federal wage-price controls." The point is, there is good reason to believe that the legislation proposed by these various bills may be, and should be, considered violative of states' rights protected by the Federal Constitution.

Let me return to the fundamental issues of the proposed legislation. As I said before, <u>the issues presented by proposed federal laws covering collective bargaining for public employes are perhaps the most important current issues to confront public officials, and to confront the general functioning of representative government in our society.</u> These issues are far-reaching and of fundamental significance.

<u>Without overplaying the significance of these proposals, let me assure you that what is proposed in these pending federal bills will radically change the manner in which public policy regarding public services</u> - education and all other public services - <u>is determined in all states.</u>

IF WE ARE TO UNDERSTAND, AND APPRECIATE, THE LIKELY CONSEQUENCES OF THE PENDING FEDERAL LEGISLATION FOR PUBLIC EMPLOYE COLLECTIVE BARGAINING, THERE IS A BASIC FUNDAMENTAL PRINCIPLE THAT WE MUST UNDERSTAND.

COLLECTIVE BARGAINING IS A PROCESS OF LABOR RELATIONS. IT IS NOT A PROCESS WHEREBY THE GENERAL FORM, QUANTITY OR QUALITY OF PUBLIC SERVICES ARE TO BE DETERMINED. IT IS NOT A DEVICE TO DETERMINE PUBLIC POLICY.

IN ORDER TO FULLY APPRECIATE THIS, THINK ABOUT HOW REPRESENTATIVE GOVERNMENT IS DESIGNED TO FUNCTION. THE GENERAL PUBLIC - AMERICAN SOCIETY - HAS OPTED FOR A FORM OF GOVERNMENT WHEREBY ELECTED, AND APPOINTED, OFFICIALS ARE DESIGNATED TO REPRESENT THE INTERESTS OF THE GENERAL PUBLIC. EVEN IN THESE TROUBLED WATERGATE TIMES, IT IS GENERALLY RECOGNIZED THAT THE BASIC SYSTEM THAT AMERICANS HAVE CHOSEN FOR GENERAL GOVERNANCE PROVIDES THE GREATEST PERSONAL FREEDOM, AND THE GREATEST PERSONAL SECURITY, OF ANY SYSTEM OF GOVERNMENT NOW IN EXISTENCE, OR THAT HAS EXISTED IN THE PAST. THEREFORE, WE NEED TO KEEP CAREFULLY IN MIND, AS WE LOOK AT THESE FEDERAL PROPOSALS TO CONTROL PUBLIC EMPLOYERS AND PUBLIC EMPLOYES, THE EFFECT THAT SUCH PROPOSALS MAY HAVE ON THE PROPER FUNCTIONING OF REPRESENTATIVE GOVERNMENT. TO THE DEGREE THAT SUCH PROPOSALS ARE ALLOWED TO ENCROACH ON THE FUNCTIONING OF REPRESENTATIVE GOVERNMENT, EVERYONE ULTIMATELY LOSES, INCLUDING THE EMPLOYES WHOSE ORGANIZATION MAY HAVE WON A TEMPORARY ADVANTAGE.

TO ALLOW PUBLIC POLICY TO BE DETERMINED THROUGH A COLLECTIVE BARGAINING PROCESS DESTROYS, OR ESSENTIALLY EMASCULATES, THE FUNCTIONING OF REPRESENTATIVE GOVERNMENT.

AMERICAN SOCIETY HAS CAREFULLY CHOSEN AND DESIGNED A SYSTEM OF REPRESENTATIVE GOVERNMENT WHICH IT USES TO DETERMINE PUBLIC POLICY AT THE NATIONAL, STATE, AND LOCAL LEVEL. WE MAY NOT ALWAYS BE HAPPY WITH THE PRODUCT OF THIS SYSTEM OF GOVERNMENT, BUT NONETHELESS, OVER A PERIOD OF ALMOST 200 YEARS AMERICAN SOCIETY HAS UTILIZED THIS SOMEWHAT NOVEL SYSTEM OF GOVERNMENT. COLLECTIVE BARGAINING IN NO WAY REPEALS THAT SYSTEM OF GOVERNMENT, AND PUBLIC OFFICIALS HAVE A HEAVY RESPONSIBILITY TO ENSURE THAT COLLECTIVE BARGAINING DOES NOT BECOME A VEHICLE FOR DETERMINING PUBLIC POLICY.

WHAT, THEN, IS THE ROLE OF COLLECTIVE BARGAINING, IF ANY, IN PUBLIC EDUCATION OR ANY OTHER FORM OF PUBLIC SERVICE? THAT ANSWER IS BOTH SIMPLE AND COMPLEX.

IF SCHOOL EMPLOYES AND OTHER PUBLIC EMPLOYES WISH TO ORGANIZE FOR BARGAINING PURPOSES, AND WISH TO HAVE SOME THIRD PARTY BARGAINING AGENT REPRESENT THEM IN SUCH BARGAINING, THEN SUCH BARGAINING SHOULD PROPERLY BE RESTRICTED ESSENTIALLY TO ECONOMIC CONCERNS OF THE EMPLOYES AND THE WORKING CONDITIONS THAT AFFECT THEM WHICH ARE NOT OF A PUBLIC POLICY NATURE.

PUBLIC OFFICIALS SHOULD NEVER BE IN THE POSITION OF BARGAINING AWAY, OR CONSTRAINING, THE PUBLIC SERVICES TO WHICH THE PUBLIC SHOULD BE ENTITLED.

THIS BASIC PRINCIPLE IS SO SIMPLE THAT IT NEEDS NO FURTHER ELABORATION. MERELY KEEP IN MIND THAT EMPLOYE UNIONS HAVE A VERY LEGITIMATE AND NATURAL INTEREST TO REPRESENT - THAT OF THEIR MEMBERSHIP. SUCH UNIONS DO NOT REPRESENT CHILDREN OR THE GENERAL PUBLIC, AND WE NEED NOT BE RELUCTANT TO POINT THIS OUT. COURTS IN MANY STATES HAVE CONSISTENTLY RULED THAT INTERESTS OF TEACHERS ARE PRIVATE INTERESTS AS CONTRASTED WITH THE INTERESTS OF THE GENERAL PUBLIC. <u>SO KEEP IN MIND THAT PUBLIC OFFICIALS ARE CHARGED WITH THE RESPONSIBILITY OF REPRESENTING THE PUBLIC INTEREST - UNIONS AND EMPLOYES ARE NOT!</u> THUS, THE SCOPE OF BARGAINING AS SUGGESTED BY THESE PROPOSED BILLS IS FAR TOO BROAD - IS LEFT VIRTUALLY UNPROTECTED.

ANOTHER PROBLEM OF THESE PROPOSALS IS THE DETERMINATION AS TO WHOM IS TO BE EXCLUDED FROM THE BARGAINING PROCESS. IF PUBLIC OFFICIALS, SUCH AS SCHOOL BOARDS, ARE CHARGED WITH REPRESENTING THE PUBLIC INTEREST AND THE ESTABLISHMENT AND IMPLEMENTATION OF PUBLIC POLICY IN ACCORDANCE WITH THE DIRECTION OF THEIR CONSTITUENTS, AND THE NATURAL FUNCTIONING OF REPRESENTATIVE GOVERNMENT, THEN SUCH OFFICIALS MUST HAVE A SUFFICIENT BODY OF OTHER PEOPLE TO SERVE AS PUBLIC AGENTS IN THE IMPLEMENTATION AND DAY-TO-DAY OPERATION OF SUCH PUBLIC POLICY. IN THE CASE OF SCHOOLS, THIS THEN MEANS THAT A SUFFICIENTLY LARGE BODY OF SCHOOL ADMINISTRATORS AND OTHER ADMINISTRATIVE PERSONNEL MUST BE EXCLUDED FROM

THE BARGAINING PROCESS SO THAT THE PUBLIC'S INTEREST IS SERVED AND SO THAT A POSSIBLE CONFLICT OF SELF-INTEREST DOES NOT GET IN THE WAY OF SERVING THE PUBLIC INTEREST. WHEN COLLECTIVE BARGAINING IS APPLIED TO EDUCATION OR OTHER FORMS OF PUBLIC SERVICE, CLASSES OF PEOPLE LIKE SUPERINTENDENTS, PRINCIPALS, OTHER SUPERVISORS, AND CONFIDENTIAL EMPLOYES MUST BE EXCLUDED FROM SUCH A PROCESS. THESE PEOPLE SHOULD EXPECT TO - AND SHOULD BE EXPECTED TO - FUNCTION AS AGENTS OF THE SCHOOL BOARD AND THE GENERAL PUBLIC AND SHOULD NOT MISUNDERSTAND THEIR OBLIGATION IN THIS REGARD.

IN ITS RECENT DECISION IN THE BELL AEROSPACE CASE[1] THE U.S. SUPREME COURT SAID IN DICTA:

> "SUPERVISORS ARE MANAGEMENT PEOPLE. THEY HAVE DISTINGUISHED THEMSELVES IN THEIR WORK. THEY HAVE DEMONSTRATED THEIR ABILITY TO TAKE CARE OF THEMSELVES WITHOUT DEPENDING UPON THE PRESSURE OF COLLECTIVE ACTION. NO ONE FORCED THEM TO BECOME SUPERVISORS. THEY ABANDONED THE 'COLLECTIVE SECURITY' OF THE RANK AND FILE VOLUNTARILY, BECAUSE THEY BELIEVED THE OPPORTUNITIES THUS OPENED TO THEM TO BE MORE VALUABLE TO THEM THAN SUCH 'SECURITY'. IT SEEMS WRONG, AND IT IS WRONG, TO SUBJECT PEOPLE OF THIS KIND, WHO HAVE DEMONSTRATED THEIR INITIATIVE, THEIR AMBITION AND THEIR ABILITY TO GET AHEAD, TO THE LEVELING PROCESSES OF SENIORITY, UNIFORMITY AND

STANDARDIZATION THAT THE SUPREME COURT RECOGNIZES AS BEING FUNDAMENTAL PRINCIPLES OF UNIONISM."

LATER IN ITS DECISION ON THIS CASE, THE COURT SAID:

"IN SUM, THE BOARD'S EARLY DECISIONS, THE PURPOSE AND LEGISLATIVE HISTORY OF THE TAFT-HARTLY ACT OF 1947, THE BOARD'S SUBSEQUENT AND CONSISTENT CONSTRUCTION OF THE ACT FOR MORE THAN TWO DECADES, AND THE DECISIONS OF THE COURTS OF APPEALS, ALL POINT UNMISTAKABLY TO THE CONCLUSION THAT 'MANAGERIAL EMPLOYEES' ARE NOT COVERED BY THE ACT. WE AGREE WITH THE COURT OF APPEALS BELOW THAT THE BOARD 'IS NOT NOW FREE' TO READ A NEW AND MORE RESTRICTIVE MEANING INTO THE ACT."

ALBERT SHANKER, PRESIDENT OF THE AMERICAN FEDERATION OF TEACHERS, SAID SOME INTERESTING THINGS ABOUT THIS IN HIS TESTIMONY BEFORE THE SENATE LABOR SUB-COMMITTEE. SAID SHANKER: ". . . THE AFT OPPOSES SUPERVISORS AND TEACHERS IN THE SAME BARGAINING UNIT UNDER ANY CIRCUMSTANCES. OUR RATIONALE IS QUITE SIMPLE. SUPERVISORS ARE AGENTS OF THE EMPLOYER IN A SCHOOL DISTRICT AS ANYWHERE ELSE. THEIR SUPERVISORY AUTHORITY DOES NOT DIMINISH ONE IOTA BECAUSE OF INCLUSION IN THE BARGAINING UNIT AND THAT INCLUSION ALWAYS LEAVES OPEN THE POSSIBILITY OF SUPERVISORY OR EMPLOYER DOMINATION." ". . . THERE IS ALWAYS THE QUESTION OF HOW CAN A BARGAINING AGENT POSSIBLY REPRESENT A TEACHER WHO FILES A GRIEVANCE AGAINST HIS PRINCIPAL IF THE

PRINCIPAL IS ALSO IN THE BARGAINING UNIT? SUCH SUPERVISORY INCLUSION IN EMPLOYEE BARGAINING UNITS IN THE PRIVATE SECTOR WOULD BE TERMED SIMPLE COMPANY UNIONISM.

"HAVING SUPERVISORS IN THE SAME BARGAINING UNIT AS SUBORDINATE EMPLOYEES IS THUS CORROSIVE OF THE FUNCTIONS OF A UNION. BUT, IT IS ALSO SUBVERSIVE OF THE FUNCTIONS OF MANAGEMENT FOR WHILE THERE IS THE CHANCE THAT THE MANAGERS MAY SUBVERT THE UNION, THERE IS ALSO THE CHANCE THAT THE UNION MAY SUBVERT THE MANAGERS.

"AN EXAMINATION OF THE ARGUMENTS FAVORING THE OPTION FOR SUPERVISORY INCLUSION QUICKLY REVEALS THEIR SPECIOUS NATURE. WE ARE SURPRISED THAT AT THIS LATE DATE THE ARGUMENT IS STILL HEARD THAT A SOMEHOW UNIQUE SITUATION EXISTS IN PUBLIC EDUCATION AND THAT A "COMMUNITY OF INTEREST" BETWEEN ALL INVOLVED IN PUBLIC EDUCATION GIVES RISE TO THE NEED FOR SPECIAL PROVISION TO ALLOW FOR SUPERVISORY INCLUSION. THE SUGGESTION IS THAT WHEN SUPERVISORS AND TEACHERS ARE TOGETHER IN THE SAME ORGANIZATION, COLLECTIVE BARGAINING WILL WORK TO SOLVE EDUCATIONAL PROBLEMS AND THAT THERE WILL BE SOMETHING CALLED "UNITY OF THE PROFESSION." IN FACT, THE IMPRESSION IS GIVEN THAT IF THERE IS NO POSSIBILITY FOR SUPERVISORS TO BE INCLUDED IN TEACHER BARGAINING UNITS, PROGRESS TOWARD FINDING THE SOLUTIONS TO PROBLEMS IN EDUCATION WILL BE IMPEDED. NO EVIDENCE IS OFFERED TO SUPPORT THIS VIEWPOINT AND WE IN THE AFT CAN PRESENT DIRECT EVIDENCE TO REFUTE IT."

OBVIOUSLY, THE ECONOMIC CONCERNS OF SUCH GROUPS (SUPERVISORS AND OTHERS) MUST BE RECOGNIZED AND DEALT WITH. THIS SHOULD NOT BE DONE THROUGH ORGANIZED CCLLECTIVE BARGAINING, HOWEVER, AND SHOULD BE MET IN A DIFFERENT WAY, WHICH IS A SUBJECT UNTO ITSELF.

THE PROPOSED FEDERAL LEGISLATION WOULD LEGALIZE STRIKES BY PUBLIC EMPLOYES. STRIKES BY SCHOOL EMPLOYES, OR OTHER PUBLIC EMPLOYES, CANNOT BE SANCTIONED BECAUSE THE GENERAL PUBLIC IS ALMOST POWERLESS TO STAND AGAINST SUCH A FORCE. LEGALIZING STRIKES BY PUBLIC EMPLOYES CREATES A SITUATION WHICH LEAVES THE PUBLIC LITTLE CHOICE BUT CAPITULATION WHEN CONFRONTED WITH A DENIAL OF THE VERY PUBLIC SERVICE THAT THE FUNCTIONING OF REPRESENTATIVE GOVERNMENT HAS DIRECTED SHOULD EXIST AS A MATTER OF PUBLIC POLICY.

DESPITE THE PROTESTATIONS OF EMPLOYE GROUPS, IT SHOULD BE REALIZED THAT THERE IS NO INHERENT RIGHT TO STRIKE, EITHER IN PUBLIC OR PRIVATE EMPLOYMENT. THE UNITED STATES SUPREME COURT, IN ITS 1971 DECISION DEALING WITH THE UNITED FEDERATION OF POSTAL CLERKS,[2] SAID: "GIVEN THE FACT THAT THERE IS NO CONSTITUTIONAL RIGHT TO STRIKE, IT IS NOT IRRATIONAL OR ARBITRARY FOR THE GOVERNMENT TO CONDITION EMPLOYMENT ON A PROMISE NOT TO WITHHOLD LABOR COLLECTIVELY, AND TO PROHIBIT PUBLIC STRIKES BY THOSE IN EMPLOYMENT --".

MANY WILL THEN SAY, IF THE LEGAL RIGHT TO STRIKE BY PUBLIC EMPLOYES IS TO BE DENIED, THEN INTEREST ARBITRATION BINDING ON BOTH PARTIES MUST BE USED AS AN ALTERNATIVE TO STRIKES. THIS

IS NONSENSE. BINDING ARBITRATION IS NO BETTER SUBSTITUTE THAN STRIKE FOR THE PROPER FUNCTIONING OF REPRESENTATIVE GOVERNMENT. ARBITRATORS SHOULD NOT BE PLACED IN THE POSITION OF ESTABLISHING PUBLIC POLICY - THIS IS A FUNCTION TO BE WHOLLY RESERVED TO PUBLIC OFFICIALS WHO ARE THE AGENTS OF THE PUBLIC. GRIEVANCE ARBITRATION - A PROCESS WHEREBY DISPUTES THAT ARISE AS TO THE MEANING OF AN ALREADY EXISTING CONTRACT - MAY BE AN ACCEPTABLE WAY OF RESOLVING DISPUTES UNDER A CONTRACT. ARBITRATION, HOWEVER, IS NO WAY TO REACH THE SUBSTANCE OF AN AGREEMENT. HAVING ARBITRATION AVAILABLE AS A SUBSTITUTE FOR EFFECTIVE BARGAINING VIRTUALLY ENSURES THAT EFFECTIVE BARGAINING WILL NOT TAKE PLACE. THUS, WHILE MEDIATION AND FACT FINDING ARE ACCEPTABLE WAYS OF ENDEAVORING TO RESOLVE IMPASSES ON SUBSTANTIVE ISSUES IN PUBLIC SECTOR COLLECTIVE BARGAINING, STRIKES AND ARBITRATION ARE NOT ACCEPTABLE AND SUFFICIENT EXPERIENCE ALREADY EXISTS TO SUPPORT THAT NOTION.

OBVIOUSLY, ALL OF THE EMPLOYE GROUPS SEEKING SUCH LEGISLATION HAVE STRONGLY SUPPORTED LEGALIZING STRIKES BY PUBLIC EMPLOYES. AGAIN, MR. SHANKER HAD SOMETHING EXPECIALLY INTERESTING TO SAY:

> "I WANT TO STATE IN NO UNCERTAIN TERMS THAT THE AFT CONSIDERS THE RIGHT TO STRIKE TO BE AN ABSOLUTELY BASIC ELEMENT IN ANY SYSTEM OF LABOR RELATIONS WHICH HAS AS ITS AIM THE GRANTING OF EMPLOYEES THAT FUNDAMENTAL RIGHT OF HAVING A SAY IN DETERMINING THE CONDITIONS UNDER WHICH THEY MUST WORK THROUGH MEANINGFUL COLLECTIVE BARGAINING. WHEN THE RIGHT TO WITHHOLD LABOR

IS LIMITED THEN THE WORD BARGAINING LOSES ITS MEANING BECAUSE THE POWER OF EMPLOYEES IS DISSIPATED. WITH THE STRIKE TOOL, THE EMPLOYER IS FORCED TO CONSIDER ALTERNATIVES--DOES THE PUBLIC VALUE THE SERVICE ENOUGH TO INDICATE MEETING THE DEMANDS; HOW MUCH OF A TAX INCREASE IS THE PUBLIC WILLING TO ASSUME; IS THE PUBLIC WILLING TO DO WITHOUT THE SERVICE FOR A TIME? WITHOUT THE STRIKE, THERE IS NO MEANINGFUL PRESSURE ON THE EMPLOYER TO REACH AGREEMENT WITH ITS EMPLOYEES. . . . (EMPHASIS ADDED)

"SOME OPPONENTS OF PUBLIC EMPLOYEE STRIKES SUGGEST COMPULSORY ARBITRATION AS A SUBSTITUTE FOR THE RIGHT TO STRIKE. LET ME POINT OUT THAT WE HAVE NO OBJECTION TO BINDING ARBITRATION. BUT THIS IS ARBITRATION JOINTLY AND VOLUNTARILY AGREED TO, NOT COMPULSORY ARBITRATION WHICH DESTROYS THE BARGAINING PROCESS BY REMOVING ALL INCENTIVE FOR COMPROMISE. FURTHERMORE, I WANT TO MAKE CLEAR THAT THIS DISCUSSION IS IN REFERENCE TO WHAT IS KNOWN AS INTEREST NEGOTIATION--NEGOTIATION OF A CONTRACT. A NEGOTIATED GRIEVANCE PROCEDURE WITH A TOP STEP OF COMPULSORY BINDING ARBITRATION AS A PART OF A CONTRACTUAL AGREEMENT HAS LONG BEEN

RECOGNIZED AS A LEGITIMATE MEANS OF RESOLVING DISPUTES DURING THE LIFE OF A COLLECTIVE BARGAINING AGREEMENT. BUT OF COURSE, THAT INITIAL AGREEMENT SHOULD ALWAYS BE ARRIVED AT BY A VOLUNTARY PROCESS OR COLLECTIVE BARGAINING HAS NO MEANING."

IN TESTIMONY BEFORE THE HOUSE SUB-COMMITTEE, THE THEN NEA PRESIDENT SAID: "PUBLIC SCHOOL TEACHERS, FOR EXAMPLE, DO NOT PERFORM FUNCTIONS DIRECTLY AFFECTING THE PUBLIC HEALTH OR SAFETY. AS A RESULT, A DISRUPTION OF THEIR SERVICES FOR A TEMPORARY TIME PROBABLY WOULD NOT HAVE A SERIOUS EFFECT ON THE PUBLIC." IT IS INTERESTING TO NOTE THAT NO CONCERN IS EXPRESSED FOR THE PUBLIC WELFARE, A CONSIDERATION THAT NEEDS ATTENTION EQUAL TO HEALTH AND SAFETY.

UNDER THE HOUSE AND SENATE PROPOSALS THAT ARE GENERALLY SUPPORTED BY MOST EMPLOYE GROUPS, A SEPARATE FEDERAL COMMISSION WOULD BE ESTABLISHED FOR ADMINISTERING THE LAW.

THE PROPOSAL SUBJECTS ALL MANAGEMENT DECISIONS TO THE GRIEVANCE PROCESS OF THE EMPLOYE ORGANIZATION, THUS FORCING PUBLIC EMPLOYERS AND PUBLIC EMPLOYES ALIKE TO ACCEPT THE RESULTS OF BINDING ARBITRATION AS THE FINAL ACTION OF ALL MANAGEMENT DECISIONS. THIS IS COMPLETELY INTOLERABLE, ESSENTIALLY MAKING THE ARBITRATOR A SUPER-GOVERNMENTAL BODY, PERHAPS GIVING HIM POWER BEYOND THAT WHICH THE ORIGINAL PUBLIC EMPLOYER BODY ENJOYED UNDER STATUTE. THIS IS AN

EMASCULATION OF THE REPRESENTATIVE GOVERNMENTAL PROCESS.

TIED TO THE FOREGOING CONDITION IS A FURTHER TROUBLING SITUATION. IN THE EVENT THAT THE TWO PARTIES - PUBLIC EMPLOYER AND PUBLIC EMPLOYE AGENT - ARE UNABLE TO REACH AN AGREEMENT AFTER HAVING GONE THROUGH THE MEDIATION AND FACT FINDING PROCESS PROVIDED IN THE PROPOSED LAW, THE PARTIES ARE COMPELLED TO ACCEPT THE FINDINGS OF BINDING ARBITRATION TO RESOLVE THE IMPASSE. THUS, ARBITRATORS ARE GIVEN THE POWER TO BOTH MAKING BINDING DECISIONS UNDER A CONTRACT, AS WELL AS DECISIONS AS TO THE SUBSTANTIVE ISSUES TO BE INCLUDED IN A BARGAINING AGREEMENT. ELECTED OFFICIALS WOULD HAVE NOTHING LEFT WITH WHICH TO REPRESENT THE INTERESTS OF THE GENERAL PUBLIC. UNDER SUCH AN ARRANGEMENT, ARBITRATORS BECOME SUPER-GOVERNMENTAL DECISION MAKERS, RESPONSIBLE TO NO ONE AND WORKING UNDER THE GENERAL COGNIZANCE OF THE PROPOSED FEDERAL COMMISSION WHICH WOULD BECOME AN UNBELIEVABLY POWERFUL SUPER-GOVERNMENTAL BODY THAT WOULD CONTROL STATE AND LOCAL GOVERNMENT DECISIONS. IT IS DIFFICULT TO COMPREHEND THE ULTIMATE EFFECT OF SUCH AN AGENCY.

ON THIS ISSUE OF A SEPARATE COMMISSION, THE THEN NEA PRESIDENT SAID BEFORE THE SENATE SUB-COMMITTEE:

> "ALTHOUGH NLRA COVERAGE IS ACCEPTABLE AND BETTER THAN NOTHING, THERE ARE REASONS WHY WE CONSIDER INCLUSION UNDER NLRA UNDESIRABLE. FOR ONE THING, THERE IS A VAST DIFFERENCE BETWEEN THE PUBLIC AND PRIVATE SECTOR IN THAT PUBLIC EMPLOYERS ARE

POLITICALLY AND SOCIALLY MOTIVATED, NOT PROFIT MOTIVATED AS THEIR COLLEAGUES IN THE PRIVATE SECTOR. MOREOVER, THE NLRB IS ALREADY CHARGED WITH MASSIVE RESPONSIBILITIES WHICH KEEP IT MORE THAN BUSY. AS ANDREW BIEMILLER, LEGISLATIVE DIRECTOR OF AFL-CIO, PUT IT LAST JUNE 5 DURING HEARINGS ON COLLECTIVE BARGAINING FOR FEDERAL EMPLOYEES: 'WE SUPPORT THE IDEA OF A SEPARATE BOARD FOR THE REASON THAT THE NATIONAL LABOR RELATIONS BOARD'S EXISTING JURISDICTION IS ALREADY VERY BROAD, AND THE PROBLEM OF DELAY, WHICH ALREADY IS SERIOUS IN THE ADMINISTRATION OF THE PRESENT EXECUTIVE ORDER PROGRAM, MIGHT WELL BE ACCENTUATED ACROSS THE WHOLE SCOPE OF THE LABOR-MANAGEMENT FIELD. THE SPECIAL CHARACTER OF GOVERNMENT EMPLOYMENT INDICATES A SEPARATE AUTHORITY IS NEEDED WHICH WOULD MORE READILY DEVELOP THE EXPERTISE FOR DEALING WITH THE PROBLEMS COMING UNDER ITS JURISDICTION.' WE AGREE WITH THE AFL-CIO."

MR. EDWARD MILLER, FORMER NATIONAL LABOR RELATIONS BOARD CHAIRMAN, IN A RECENT COMMENT ABOUT PUBLIC EMPLOYE COLLECTIVE BARGAINING, SAID THAT THE TWO IMPORTANT PROBLEMS ARE WHETHER TAFT-HARTLEY FITS THE PUBLIC EMPLOYEE MOLD AND WHETHER THE RIGHT TO STRIKE SHOULD EXIST IN THE PUBLIC SECTOR. HE SAID THAT GENERALLY THE TAFT-HARTLEY ACT CAN APPLY TO LABOR-MANAGEMENT PROBLEMS THAT WILL ARISE IN THE PUBLIC SECTOR EVEN THOUGH THE

ACT WAS DESIGNED ON THE "FREE ENTERPRISE" MODEL. AS FOR THE RIGHT OF PUBLIC EMPLOYEES TO STRIKE, MILLER SAID THAT THE IDEA IS NOT WIDELY ACCEPTED AND SOME SYSTEM INVOLVING COMPULSORY ARBITRATION WOULD HAVE TO BE DESIGNED AS A SUBSTITUTE FOR THE RIGHT TO STRIKE. THE CHAIRMAN SUGGESTED THAT HAVING PUBLIC EMPLOYEES UNDER THE SAME BOARD WITH PRIVATE EMPLOYEES WOULD "MAKE MORE SENSE".

NOW, WHERE DOES THAT LEAVE US WITH RESPECT TO THE PROBLEMS OF THE TWO KINDS OF PROPOSALS THAT ARE BEING CONSIDERED.

LEGISLATION LIKE HR 8677, IN SUMMARY, PROVIDES FOR THESE THINGS:

- REGULATES PUBLIC EMPLOYER-EMPLOYE RELATIONSHIPS AND APPLIES TO ALL UNITS OF STATE AND LOCAL GOVERNMENT;
- ESTABLISHES A NATIONAL PUBLIC EMPLOYES RELATIONS COMMISSION THAT WOULD FUNCTION MUCH AS THE NATIONAL LABOR RELATIONS BOARD DOES IN PRIVATE EMPLOYMENT;
- ESTABLISHES AN UNRESTRICTED SCOPE OF BARGAINING WHICH IS DEFINED AS "TERMS AND CONDITIONS OF EMPLOYMENT AND OTHER MATTERS OF MUTUAL CONCERN RELATING THERETO"; (THIS LATTER PHRASE OPENS UP THE SCOPE OF BARGAINING TO THE DEGREE THAT NO ITEM OF PUBLIC POLICY DETERMINATION IS PROTECTED FROM THE BARGAINING PROCESS);
- INCLUDES SUPERVISORS IN THE COVERAGE OF THE LAW, MERELY LIMITING SUPERVISORS TO SEPARATE BARGAINING UNITS BUT ALLOWING THEM MEMBERSHIP IN THE SAME EMPLOYES' ORGANIZA-

TION THAT REPRESENTS RANK AND FILE MEMBERS;

- ESTABLISHES MEDIATION AND FACT FINDING AS WAYS TO RESOLVE BARGAINING IMPASSES BETWEEN EMPLOYER AND EMPLOYE AGENT, BUT GOES BEYOND THIS IN ALLOWING THE EMPLOYE AGENT TO OPT FOR A LEGALLY PERMISSIBLE STRIKE OR BINDING ARBITRATION (NO SUCH CHOICE IS GIVEN TO THE EMPLOYER);
- LOCKS EMPLOYES INTO A UNION BY REQUIRING THE EMPLOYER TO MAKE DUES DEDUCTIONS AND GIVES EMPLOYES LITTLE REAL CHANCE TO CHOOSE NOT TO BELONG TO A UNION OR PAY UNION DUES.
- IT PROVIDES FOR FEDERAL REGULATION OF STATE AND LOCAL GOVERNMENT EMPLOYES IN A WAY WHICH PROBABLY CONTRAVENES THE CONSTITUTIONAL RIGHTS OF STATES AND LOCAL GOVERNMENTS.

HR 77 (OR HR 9730 FROM THE 93RD CONGRESS), WHICH IS THE OTHER PROPOSAL PRESENTLY BEING CONSIDERED, WOULD SIMPLY PLACE ALL PUBLIC EMPLOYES UNDER THE JURISDICATION OF THE NATIONAL LABOR RELATIONS ACT AND THE NATIONAL LABOR RELATIONS BOARD. MOST OF THE FAULTS, OR PROBLEMS, THAT ONE SEES IN HR 8677 AND ITS OPERATION UNDER A SEPARATE COMMISSION TO CONTROL AND REGULATE ONLY PUBLIC EMPLOYES ARE EQUALLY PRESENT UNDER THE ARRANGEMENT OF HR 9730 AND THE NATIONAL LABOR RELATIONS BOARD. THIS DESPITE THE FACT THAT NLRB HAS BEEN SOMEWHAT MORE CIRCUMSCRIBED IN THE PAST IN MANDATING BARGAINING OVER MANAGEMENT ISSUES AND IN ELIMINATING MANAGEMENT PERSONNEL FROM THE BARGAINING PROCESS ON THEIR OWN BEHALF.

IN MY VIEW, ANY ARRANGEMENT THAT PERMITS SOME FEDERAL, APPOINTIVE AGENCY TO PRE-EMPT STATE AND LOCAL GOVERNMENT OFFICIALS IN THEIR DECISIONS REGARDING HOW THE MISSION OF THAT AGENCY IS TO BE PERFORMED, AND ITS WORKING RELATIONSHIP WITH THE EMPLOYES OF THAT AGENCY, IS COMPLETELY UNACCEPTABLE AND SHOULD BE REJECTED.

1. Bell Aerospace vs. National Labor Relations Board, U. S. Supreme Court No. 72-1598, decided April 23, 1974, wherein the Court ruled NLRB could not expand its rules to enlarge coverage of the National Labor Relations Act to include managerial employes.

2. United Federation of Postal Clerks vs. Winston M. Blount, U.S. Postmaster General, U. S. Supreme Court upholding the decision of the U.S. District Court for the District of Columbia, Civil Action No. 3297-69, wherein the union had challenged the Constitutionality of federal laws barring federal employes from striking. The Court held for the government.